Supreme Court, U.S.
FILED
001657 MAR 6 - 2001
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JAMES J. ASKEW,
Petitioner,

v.

UNION PACIFIC RAILROAD CO., RAIL TERMINAL SERVICES, TEAMSTERS LOCAL 600, ET AL.,
Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTION(S) PRESENTED

I. Within the parameter's of a discharge, grievance and arbitration procedures framed within a Collective Bargaining Agreement, if the employers evidence in support of the discharge is blatantly false, does that falsity serve, pro se, to add another dimension to the

Court's remedial responsibilities?

II. Did the Union by allowing the discharge in Violation of the National Master Freight Agreement (CBA) Article 46 and allowing the Company to falsely accuse Plaintiff of violating and committing a "Cardinal Act" as listed in the CBA, and discharge for Breaking unspecified Federal and State Laws, breech it's Duty of Fair representation?.

III. Did the Union by failing to make any effort on behalf of plaintiff to verify any and all statements and acts by the company during the grievance procedure and after Mr. List Deposition of 4/30/99 in which it learned first hand that the company through V.P. G.M. Mr. Mike List had blatantly lied in the course of events Breech DFR?. *See International Association of Machinist and Aerospace Workers Local 39, AFL-CIO (Roy G. Evans 24 Flra No. 39, 24 Flra 352, 353 (1986)*

IV. Did the Union by failing to act on plaintiffs behalf following the disposition of Mr. List where he admitted, he had blatantly lied in the course of the grievance procedure breech its duty of Fair Representation?

V. Did the Courts below fail to address the CBA Article 46 and allow issues to be brought into the procedures which were not covered by the CBA? (Namely, Sexual Harassment, Breaking of Federal or State Laws?)

VI. Did the Employer utilize an accusation of sexual harassment as a fraudulent, dishonest, camouflage and/or as a smoke screen, red herring, and/or cover up in order to justify its false reason's for plaintiffs termination?

VII. Is the plain unvarnished truth that plaintiff was wrongfully, retaliatory terminated because of protected activities ?

VIII. Did the Court's below fail to consider the totality of the circumstances?

LIST OF PARTIES

[ ] ALL PARTIES DO NOT APPEAR IN THE caption of the case on the cover page.

A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows;

James J. Askew

(Plaintiff)

vs.

Union Pacific Railroad
Rail Terminal Services
Teamsters Local 600 I.B.T.
International Brotherhood of Teamsters
Washington D.C.

(Defendants)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals at Appendix A to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States court of appeals at Appendix B to the petition and is

[ ] reported at unknown?; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was Dec. 6, 2000.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

Case filed within 90 days per 28 U.S.C. § 2101(e)

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a).

JURISDICTION AND VENUE

This is an action brought under the provisions of the National Labor Act of 1947.

} 301 and 29 U.S.C. } 185 (a)(c). This court has jurisdiction pursuant to the provisions of 29 U.S.C. } 185 (c), 28 U.S.C. } } 1331, 1337, 1367 (1995) and 42 U.S.C.} 2000e, *et seq.* (1995), because of federal question jurisdiction. The jurisdiction of this court is invoked under 28 U.S.C. } 1254 (1). 42 U.S.C. Sec. 12203 and FELA 45 U.S.C. Sec. 51 et seq.

As this case arises under Federal laws regulating Interstate Commerce , and Section 706 (f)(3) of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000 e5 (f)(3)

STATEMENT OF THE CASE

Plaintiff/Appellant was discharged on or about July 31, 1997 by an undated letter. The company stated for "Just Cause" under article 46 (CBA) and Discriminatory Acts Prohibited by Federal and State law. (Letter and Article 46 and 37 Attached) Company contended

that Sexual Harassment was a "Cardinal Act" (Dischargeable) as called for by the National Master Freight Agreement (NMFA) or (CBA) Collective Bargaining Agreement.

During the 3 Step grievance process the company made many false statements, to the various grievance panels willfully and intentionally in order to justify falsely, Plaintiffs termination in violation of the CBA.

The Union knowingly allowed the Union Steward to testify falsely, in support of the company's position, failed to allow plaintiff access to his accuser, failed to provide documents requested, allowed company more time than allowed by contract to process its investigation. The Union allowed termination without a warning letter as required by the CBA for "Just Cause". Allowed the company to testify Plaintiff had broken, Unspecified Federal and State laws, and a Company policy which did not exist, without verification.

Which is supported and admitted to in Mike List Deposition of 4/30/99.

The Courts below have failed to address the issue of breech of a Collective Bargaining Agreement and have been misled by opposing counsel to think this is a Sexual Harassment case. This show's the extreme measure's that have been used to hide the real and honest reason for the plaintiffs termination, which was purely a retaliatory act against plaintiffs legal acts which are protected by Law.

Even if Plaintiff was Guilty of this charge, according to the CBA which is very limited and specific on what reason's a person can be terminated without a warning letter states, "except in listed cases, he has to have a

warning letter prior to discharge". (Article 46.) The Contract Guide Interpretations which are precedent setting cases as acknowledged by the Union and Companies in there Statement of Policy (Attached) uphold plaintiffs position.

The Interpretations have been up held by the National Labor Relations Board as a intricate part of the CBA. A letter dated February 25, 1980 from the Dept. Of Labor to Plaintiff so states.

Rail Terminal Services (RTS) V.P. G.M. Mike List has Alleged that "He did not know of Mr. Askew prior to his decision to terminate Plaintiff".

(Court Of Appeals ruling Page 3 Last Paragraph)

However, Mr. List deposition of 4/30/99 page 7 Line 2-10 Mr. List states, " He is the Top Human Resources head and as such lower level managers tell him of situations".

Plaintiff, was involved with the E.E.O.C. on a A.D.A. claim and a law suit (Southern District Of Illinois 96-512 WDS) which resulted in a change of company policy on 4/21/97.

This is the same E.E.O.C. claim that the Company had to issue in 1997 a change of policy which the court feels since it was filed in 1993 had no bearing on Mr. List

.

O.S.H.A. Letter to The Union Pacific Railroad on July 16, 1997 one day before false charges and discharge occur to plaintiff. Plaintiff agrees to settle law suit. RTS fails to live up to the agreement requiring a motion to enforce settlement by plaintiffs attorney on Aug. 19, 1998. R.T.S. was notified by Mail of F.E.L.A. claim on June 19, 1997 one month before discharge.

Mr. List as top Human Resources Officer had to authorize attorney expense, change in company policy, "signed and issued by Mr. List, 4/21/97" and settlement cost with plaintiff and according to his statement had to be aware of government charges from O.S.H.A. from his lower level managers.

Mr. List lied in Grievance Procedures and now, apparently lies under oath to the Court, which the Court failed to note in his disposition of 4/30/99.

Plaintiff's law suit was summarily dismissed by the District Court and upheld by the Court of appeals below.

U. S. CONSTITUTION

Amendment VII:

States, "In suits at common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any Court of the United States than according to the rules of common law"

Plaintiff has been denied a JURY trail And A fair Hearing in the Grievance process based on the Letter of Termination And Company's Statements in Hearings and Disposition. The Court's below have concentrated on the Sexual harassment issue and failed to enforce the Collective Bargaining Agreement as Written and Supported By the Contract Interpretation's and have Failed to address the companies False statements. Have failed to show any breakage of any law whether State or Federal by plaintiff. The Company can not show a legitimate non-discriminatory reason for Discharge. (*Adusumilli* 164 F. 3d at 362.)

Prima facie case? Simple, Plaintiff Filed A OSHA case on July 15 1997 Company received Letter July 16, 1997 plaintiff suspended July 17th 1997 Terminated July 31 1997. Workers comp case April 97. EEOC force's change in company policy 4/21/97. Law Suit pending over EEOC (Right to Sue issued) lawyers involved, settled and then company fails to comply with agreement.

REASONS FOR GRANTING THE PETITION

This Court has made finding's in *Reeves v. Sanderson USSC No.99-536* Justice O'Conner page 4 -5 2nd Paragraph " *McDonnell Douglas Corp. v. Green* 411 U. S. (1973) combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated."

Page 5, 1st paragraph " plaintiff's discrediting of employer's explanation is entitled to considerable weight such that plaintiff should not be routinely required to submit evidence over and above proof of pretext".

Justice Ginsburg Concurring:

> "The Court today up holds that an employment discrimination plaintiff may survive judgment as a matter of law by submitting two categories of evidence First, a *prima facie case* as that term is used in *McDonnell v Green (1973)* Second, evidence from which a rational fact finder could conclude that the employer's proffered explanation for its actions was false".

(Page 2) "But the inference remains-unless it is conclusively demonstrated by evidence the District Court is required to credit on a motion for judgment as a matter of law , see *ante,* at 15-16, that discrimination could not have been the defendant's true motivation, etc.".

" liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above".

Justice Stevens, (January 24,1994)

ABF Freight System v National Labor Relations board USSC 92-1550.

Page 3 "False Testimony in a formal proceeding is intolerable. We must neither reward nor condone such (flagrant affront) to the truth seeking function of adversary proceedings. ..... In any proceedings, whether judicial or administrative, deliberate falsehoods "well may affect the dearest concerns of the parties before a tribunal".

December 10, 1990 Case #89-1166 *Opinion v. Ring Screw Works Ferndale Div.* Justice Stevens: II Section 301 (A) of the LMRA provides a Federal remedy for breech of a collective bargaining agreement. Petitioners present law suit against the employer was for wrongful discharge and is the kind of case Congress provided for in 301 Id at 561-562.

Justice Kennedy March 19, 1991 USSC 89-1027-& 89-1028 *Opinion & W.R. Co. V. Train dispatchers et. al.* Page 10 last paragraph "The RLA governs the formation, construction and enforcement of the labor-management contracts in issue here. It requires carriers and employees to make reasonable efforts " to make and maintain" Collective-Bargaining Agreements 45 U.S.C. 152. First, and to refrain from making changes, in existing agreements except in RLA procedures 45 U.S.C. 152 seventh 156."

The Act " extends both to disputes concerning the making of Collective Agreements and to grievances

arising under existing agreements . *Slocum v. Delaware, L & W.R. Co.,* 339 U.S. 239, 242 (1950).

> As the Law which gives "Legal and binding effect to collective agreements. *Detroit &* Toledo Shore Line R. Co. V. United Transportation Union."

Arch of Illinois v. District 12 U. M.. Workers and Local No. 1392 UMWA. C Case # 95-3233 Seventh Circuit Feb 23, 1996, Page 3 at II.

"We review the district courts grant of summary judgment de Nov and apply the same standard as that employed by the district court. *Jasper Cabinet Co. v. United Steelworkers of America,* 77 F.3d 1025, 1026 (7th Cir. 1996). Summary judgment should be granted if the pleadings and supporting documents "show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Iv. P. 56(c)Party opposing the motion must go beyond the pleadings and affirmatively demonstrate a genuine issue of material fact for trial. *Celotex Corp. v, Catrett, 477 U.S.* 317,324 (1986). The Discharge of plaintiff is against the CBA and "cannot be rationally derived from some plausible theory of the general frame work of intent of the agreement." *Ethyl Corp., 768 F.2d* at 186.

The Employer who is held ultimately responsible for working conditions , and it is the employer's actions that must be closely examined. (See generally Employment Discrimination at 839-41 (21)).

Under *Gold Coast Restaurant Corp. V. NLRB, 995 F.2d 257, 265-66 (D.C. Cir. 1993)* A Constructive discharge is established where employer took actions resulting in reduction of employees pay, engaged in disparate disciplinary action and threatened employee.

Illinois Law Pertaining to Fraudulent Misrepresentation Requires Plaintiff to prove the following:

1) The representation must be a statement of material fact.

a) Discharge Letter contains false material facts

2) The representation must be false.

a) RTS and its Supervisors knew the contract and knew that their actions where in violation of the CBA. Representations that Company had been told by UPRR they did not want plaintiff on property and RTS would lose there contract etc. (Mr. List Disposition 4/30/99)

3) The representation must be false : Mr. List Disposition 4/30/99

4) The receiver of the statement must reasonably rely on it's truth. The grievance panel based the termination of plaintiff on Mr. List false statements and threat of the loss of jobs.

5) The Statement must have been with the purpose of cause the receiver to act.

Plaintiff; States there is no other reason or basis, for Mr. List statements to the J AC except to harm plaintiff.

6) The receiver must detrimentally rely on the statement ;

The JAC allowed a discharge in violation of the CBA, and Past Practice and Voted against Plaintiff which is tantamount to abandonment of Plaintiff.

The Courts below **ERRED,**

> Under the Federal Rules of Civil Procedure Article 56 (c) and its amendments. Quote" if there is any general issue as to any material *fact* then Summary Judgment may not be granted".

Humphrey V. Moore 375u. s, 335 (1864)

Conley V. Gibson 355 U. S. 41 (1957)

> Holds that *Steele* and its progeny required fair representation not only in the execution of a CBA but also its enforcement.

In lujan V. National Wildlife Fed'n, 497 U. S. 242, 255 (1986)

> The U. S. Supreme Court stated on a ruling upon a rule 56 motion " a District Court" MUST" resolve any factual issues of controversy in favor of the non-moving party.

RTS and UPMF have continuously had s separate set of Rules for plaintiff including lower pay working conditions and ultimately a fraudulent discharge based on fraud and False threats to the Grievance panels of the loss of contract which would result in loss of many Union jobs. (See JAC Sept. & Mike List Disposition 4/30/99)

> J.A.C. page 384 page 15-16 " we'd be sitting here again trying to figure out just exactly what we can do with Mr. Askew because the Railroad don't want him on our property anymore"

Page 386 lines 3-4 "Her contract is not jeopardized but, ours is".

Mike List deposition 4/30/99.

Page 10 line 14 Question. "Did any one from Union Pacific ever give you any indication that if you didn't discharge Jim Askew that would be grounds for terminating the Contract?

Answer by Mr. List "No"

Page 389 JAC Hearing Sept. 9,1997 Page 389 Line 5

Mr. Wright Question to Mr. List,

When did you send your sexual policy to the local union?

Mr. List " Well it wasn't.""

Plaintiff was Discharged Falsely for Breaking a Collective Bargaining Agreement By breaking a none existing Company Policy and Non-existent Federal and State Law The Courts below: Did not consider Mr. List Deposition.

Plaintiff has not been charged nor convicted in any way on any legal bases of violating any specific law or existing policy of the company or union contract.

The State of Illinois received a protest on plaintiffs unemployment from RTS, the burden of proof was placed on the company and they did not show or ask for a hearing! Mr. List, at the Mo-Kan hearing's denied knowing any thing about it and said he would look in to it. (nothing was ever done because they know its all fraud. (Ill. Finding Attached.) (A-36) Illinois granted Plaintiff unemployment comp.

As there was no evidence of Sexual Harassment provided by the Company.

Section 704 (A) of the title VII of the Civil Rights Act of 1964 as amended prohibits discrimination by an employer against an employee because the employee has opposed any practice made an unlawful practice under Title VII (CRA)

CONCLUSION

The Trial Court was overly concerned about rushing to judgment in this case. The Court erred when it invaded the province of the jury and weighed the evidence to determine the alleged ambiguities of the Collective Bargaining Agreement. The Court prejudicially erred when it denied plaintiff an opportunity to produce evidence of a hostile working environment, and Mr. List disposition that there was sufficient evidence to show fraud, breech of contract, perjury, and Civil conspiracy to deny plaintiff his civil rights by misrepresentation's of the facts of contract and various laws to the court and grievance panels in an effort to harm plaintiff. The Court apparently erred by issuing a *Res. judicata* ruling on evidence apparently not read by the court namely Mr. List deposition.

The Court erred by applying the wrong standards to Plaintiff which were much higher than *THOMAS v. UNITED PARCEL SERVICES INC.* (7TH Cir.) and *REEVES v. SANDERSON, USSC* No. 99-536 (2000) in granting judgments for defendants as a matter of law in that he weighed the evidence and made finding of facts which should have been the province of a trial and findings by a jury.

The Court also erred granting UPRR And the IBT's motion for a summary judgment which Plaintiff has opposed.

Plaintiff requests that this court reverse the judgment of the Courts below and remand all counts for a new trial.

Based on the CBA and Mr. List Testimony Plaintiff would urge a finding for plaintiff and a trail for monetary damages only be set.

Plaintiff respectfully reminds the court he is not a lawyer and requests an oral argument before the court.

James J. Askew
Appellant Pro-se
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Cause No. 98-CV-191-WDS

JAMES ASKEW,
Plaintiff,

v.

UNION PACIFIC RAILROAD CO.,
RAIL TERMINAL SERVICES, and
TEAMSTERS LOCAL 600,
affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO and INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Defendants.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This matter came before the Court on Rail Terminal Services and Teamsters Local 600's separate motions for summary judgment pursuant to Fed. R. Civ. P. 56.

IT IS ORDERED AND ADJUDGED that pursuant to the Order of this Court dated November 1, 1999, judgment is entered in favor of defendants RAIL TERMINAL SERVICES and TEAMSTERS LOCAL 600, and against the plaintiff, JAMES ASKEW.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to the Order of this Court dated October 14, 1999, judgment is entered in favor of the defendant, UNION PACIFIC RAILROAD CO., and against the plaintiff, JAMES ASKEW.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to the stipulation of dismissal filed September 13, 1999, and the order granting same filed October 14, 1999, all claims the plaintiff, JAMES ASKEW, has against INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, are dismissed with prejudice, each party to bear its own attorneys' fees and costs.

DATED this 1st day of November, 1999.

NORBERT G. JAWORSKI,
CLERK
BY: /s/ Sandy Pannier
Deputy Clerk

Filed November 1, 1999
Clerk, U.S. District Court
Southern District of Illinois
East St. Louis Office

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

CAUSE NO. 98-CV-191-WDS

JAMES ASKEW,
Plaintiff,

v.

RAIL TERMINAL SERVICES and TEAMSTERS LOCAL 600, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO,
Defendants.

Filed November 1, 1999

CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF ILLINOIS EAST ST. LOUIS OFFICE

MEMORANDUM & ORDER

STIEHL, District Judge:

Before the Court are defendants Rail Terminal Services' ("RTS") and Teamsters Local 600's separate motions for summary judgment pursuant to Fed. R. Civ. P. 56.

BACKGROUND

Plaintiff filed a two-count amended complaint against Rail Terminal Services ("RTS"), Union Pacific Railroad Company ("UPRR"), International Brotherhood of Teamsters (the "Teamsters"), and Teamsters Local 600 ("Local 600"), alleging that his July 1997 discharge for sexual harassment was unlawful. Specifically, Count I

alleges what is referred to as a "hybrid § 301/DFR" claim, specifically, that: (1) RTS and UPRR breached a collective bargaining agreement in violation of § 301 of the Labor Relations Management Act, 29 U.S.C. § 185, when plaintiff was discharged; and (2) Local 600 and the Teamsters breached their duty of fair representation ("DFR") under § 301 during and after RTS's investigation of the sexual harassment charges brought against plaintiff. Count II alleges that RTS and UPRR discharged plaintiff in retaliation for filing a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC") in September 1993. The Court previously granted summary Judgment for UPRR, and dismissed the Teamsters with prejudice on Stipulation of the parties, thereby leaving RTS and Local 600 as the sole defendants in this lawsuit.

Defendants argue that summary judgment is appropriate on plaintiff's hybrid § 301/DFR claim because: (1) plaintiff did not file his claim within the relevant six-month statute of limitations; and (2) plaintiff cannot demonstrate that RTS breached the collective bargaining agreement and that Local 600 simultaneously breached its duty of fair representation. RTS argues that summary judgment is appropriate on the retaliatory discharge claim because plaintiff cannot prove a *prima facie* case of retaliatory discharge, and even if he can, plaintiff cannot demonstrate that the articulated reason for his discharge was a pretext for retaliatory discharge.

FACTS

RTS was created on February 28, 1997, when UPRR sold its wholly owned subsidiary, United Pacific Motorfreight ("UPMF"), to RTS. Plaintiff worked for

UPMF as a truck driver prior to February 28, 1997, and after the stock sale, plaintiff worked for RTS as a "spotter." Plaintiff was covered by a collective bargaining agreement titled the National Master Freight Agreement and the Central States Area Local Cartage Supplement Agreement (hereafter, the "CBA"), initially executed between UPMF and Local 600, and subsequently adopted by RTS. The CBA establishes a grievance procedure whereby grievances are heard and decided by joint employer-union grievance panels or committees. (*See* CBA, Article 45). If a majority decision is reached in front of a local six-member panel, that decision is final and binding. (*Id.*). If the panel deadlocks, the grievance may be appealed to a joint state committee. (*Id.*). If the joint state committee renders a decision, that decision is final and binding. (*Id.*). If the committee deadlocks, the grievance may once again be appealed to a final joint area committee, which will render a final and binding decision. (*Id.*).

The events leading to plaintiff's discharge are as follows. During the week of July 14, 1997, plaintiff was filling in as a "trailer-inspector." As a trailer-inspector, it was plaintiffs job to inspect all incoming and outgoing trailers for damage. Genise Talley was an independent contractor who had contracted with UPRR to transport trailers. Each time Talley entered the Dupo facility during the week of July 14, she was required- to have her loads inspected by plaintiff. On July 18, 1997, Talley complained to Brad Chilton, RTS's Terminal Manager in Dupo, that plaintiff had subjected her to sexually offensive and unwelcome remarks and gestures during the preceding week. Specifically, she complained that, *inter alia*, petitioner repeatedly said things to her, in the presence of others, like "you're my woman, you're com-

ing home with me tonight;" "when you [her husband] are not around, Genise takes care of me, she rubs on me and massages me;" and "when are you getting off so we can go home?" Talley also told Chilton that petitioner had put his hands on her waist. The harassing incident that finally caused her to complain occurred on July 17, 1997. Talley reported that on that day, petitioner, in the presence of others, including her husband, said, "Do you know how to play TV repairman?" He then rotated his hands in front of Talley's breasts and said, "You tune the knobs." Chilton asked Talley for a written statement and advised her that he would investigate the matter.

Chilton then met with plaintiff and his union steward, Don Green, to inform plaintiff that sexual harassment allegations had been levied against him. Plaintiff admitted that he knew what sexual harassment was, and that it is against the law. While there was some dispute concerning the substance of the incidents, plaintiff did not deny their occurrence, and maintained that the comments were jokes and the touching was innocuous and nonsexual. Chilton concluded the meeting by informing plaintiff that RTS was taking Talley's allegations very seriously, and that plaintiff would be notified of the company's position pending further investigation. Chilton contacted Mike List, RTS's Vice-President and General Manager, and summarized his conversations with Talley and plaintiff. List ordered Chilton to suspend plaintiff pending investigation, and, in the presence of Don Green, telephoned plaintiff at home and informed him of the suspension. RTS also sent to plain-

tiff a letter dated July 18, 1997 regarding his suspension.[1]

During the following week, RTS continued its investigation of the sexual harassment allegations. Chilton concluded his investigation, and sent four witness statements, Talley's own written statement, and his own notes summarizing the investigation to List, who, after reviewing these documents, decided to discharge plaintiff. An employee is subject to discharge for "just cause" under the CBA.[2] List determined that just cause was present to discharge plaintiff because: (1) sexual ha-

---

[1] The letter stated: "Allegations have been brought against you in regards to your behavior from July 14 to July 18 while performing the job duties as gate inspector. Due to the severity of these allegations, under Article 46 of the National Master Freight Agreement, you are hereby suspended effective immediately, pending outcome of investigation."

[2] Article 46 of the CBA provides in relevant part:

Subject to the provisions of Article 8 of the Master Freight Agreement, the Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Local Union and job steward affected .... Prior warning notice is not required if the cause of discharge is: drug intoxication . . . ; the possession of controlled substances and/or drugs either while on duty or on company property; recklessness resulting in serious accident while on duty; carrying of unauthorized passengers; failure to report any accident which the employee is aware of-, failure to meet the minimum requirements for safe driving ... ; or unprovoked physical assault on a company supervisor while on duty or on company property.

Except in cases involving "cardinal" infractions under this Supplemental Agreement, an employee to be discharged or suspended shall be allowed to remain on the job until the discharge or suspension is sustained under the grievance procedure.

rassment is against the law and List believed plaintiff's conduct constituted sexual harassment; (2) sexual harassment is against company policy and List felt that plaintiff's conduct violated that policy; and (3) List felt that plaintiffs conduct may have jeopardized RTS's contract with UPRR absent swift and decisive action. List discharged plaintiff on July 31, 1997.

On July 24, 1997, plaintiff filed a grievance with Local 600, protesting his suspension. On July 28, 1997, plaintiff filed separate unfair labor practice charges against RTS and Local 600.[3] On August 21, 1997, at the first step of the grievance procedure, plaintiff and Local 600 President John Fischer set forth plaintiff's case in its entirety before a six-member grievance panel. Local 600 took the position that sexual harassment is not a "cardinal sin," and therefore plaintiff should not have been suspended or discharged without a prior warning notice, and that RTS was required to keep plaintiff on his job until the matter was resolved. Local 600 also introduced evidence to suggest that the conduct did not rise to the level of sexual harassment. The panel deadlocked.[4] Local 600 then appealed the grievance, and once again, a different six-member panel deadlocked. Local 600 appealed once more, to the third and final step of the grievance procedure. On September 8 or 9, 1997, a third six-member panel heard plaintiff's grievance,

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[3] Plaintiff's charge against RTS alleged that RTS had discriminated against him by suspending him because of his union membership and/or protected activities. Plaintiff's charge against Local 600 alleged that Local 600 had failed to properly represent him since July 18, 1997.

[4] After appearing before the first panel, President John Fisher retired and relinquished the handling of plaintiff's case to the company's secretary-treasurer Martin Giorgi.

and this time denied the grievance; the panel did, however, award back pay retroactive to his suspension date. Plaintiff was represented by Local 600 officials at every step of the grievance procedure, and was given the opportunity to present all the evidence that he felt supported his position. After denial of his grievance, plaintiff filed the instant lawsuit.

ANALYSIS

Fed. R. Civ. P. 56(c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317,322-23 (1986); *Popovits v. Circuit City Stores, Inc.*, 185 F.3d 726, 731 (7th Cir. 1999). The moving party initially bears the burden to demonstrate an absence of genuine issues of material fact, indicating that judgment should be granted as matter of law. *See Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 294 (7th Cir. 1999), *citing Celotex*, 477 U.S. at 323.

Once a motion for summary judgment has been made and properly supported, however, the nonmovant has the burden of setting forth specific facts showing the existence of a genuine issue for trial. *Id.* In determining whether a genuine issue of material fact exists, the Court construes all facts in the light most favorable to the nonmoving party and draws all reasonable and justifiable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, (1986). However, "the mere existence of some alleged factual dispute between the parties" is not sufficient to defeat such a motion. *Id.* at 247.

A. Hybrid § 301/DFR Claim

Defendants argue that summary judgment is appropriate on the § 301/DFR claim because: (1) plaintiff did not file his claim within the relevant six-month statute of limitations; and (2) plaintiff cannot demonstrate that RTS breached the CBA and that Local 600 simultaneously breached its duty of fair representation.

I . Statute of Limitations

Defendants initially argue that plaintiff did not file his hybrid claim within the applicable limitation period. Section 301, which establishes a federal forum for resolution of labor disputes, contains no statute of limitations. The Supreme Court, however, has held that the six-month statute of limitations set forth in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies to hybrid § 301/DFR claims, such as that presented in Count I of plaintiff's complaint. *See Adams v. Budd Co.*, 846 F.2d 428,431 (7th Cir. 1988) *citing DelCostelto v. Teamsters*, 462 U.S. 151, 154 (1983).

The parties do not dispute the applicability of the six-month limitation period. Rather, the parties disagree as to when the limitation period began to run. The Seventh Circuit has held that the limitation period begins when a final decision on an employee's grievance has been made or when an employee discovers or should have discovered that no further action would be taken on the grievance. *See Id.* at 431. *See also Metz v. Tootsie Roll Indus., Inc.*, 715 F.2d 299, 304 (7th Cir. 1983) (limitation period begins to run when employee discovers or should have discovered the acts constituting the alleged violation). Defendants argue that because plaintiff believed as of July 28, 1997 that the union was not representing him fairly, the statute of limitations began running on

that date. Thus, the filing of plaintiff's complaint on March 6, 1998 would be outside the limitation period, and his action would be time barred. The cases cited by defendants, however, are distinguishable from the instant case. In *Metz*, for instance, the union refused to act on the plaintiff's grievance, and the plaintiff argued that the union's refusal to act did not constitute a "final determination" of her grievance. *See Id.* at 303. The court denied her claim as time barred because she knew or should have known of the union's inaction at some point prior to six months preceding the time that plaintiff filed her suit. *See Id.* at 304. The instant case does not involve a refusal on the part of the union to pursue the action; rather, the union did represent plaintiff to a final determination of the grievance. On September 8 or 9, 1997, plaintiff's case reached a final resolution when a third and final six-member panel denied plaintiff's grievance. Plaintiff then filed his suit in federal court on March 6, 1998. Thus, plaintiff brought the present action within the six-month limitation period.

2. Collective Bargaining Agreement and Duty of Fair Representation

Defendants next argue that plaintiff's hybrid § 301/ DFR claim fails on the merits because plaintiff cannot demonstrate that RTS breached the CBA and that Local 600 simultaneously breached its duty of fair representation. A suit "by an employee against a union for breach of the duty of fair representation and an action against an employer under § 301 of the Labor Relations Management Act for breach of the collective bargaining agreement are inextricably interdependent." *Metz*, 715 F.2d at 301. Consequently, "neither claim is viable if the other fails." *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1241 (7th Cir. 1997). Where a collective

bargaining agreement provides for final and binding resolution, the employee must establish a breach by the union before a court will consider evidence against the employer. *See McKelvin v. E.J. Brach Corp.,* 124 F.3d 864, 869 (7th Cir. 1997); *Ooley v. Schwitzer Div., Household Mfg. Inc.*, 961 F.2d 1293,1297-98 (7th Cir. 1995). Therefore the Court will first examine plaintiffs claim that Local 600 breached its duty of fair representation.

The parties agree that a union enjoys broad discretion in its role as exclusive bargaining agent for employees, and therefore, owes the employees a duty of fair representation. *See Thomas v. United Parcel Serv., Inc.*, 890 F.2d 909,916 (7th Cir. 1989). A union, "does not, however, exercise the same degree of discretion in each of its functions." *Id.* at 917. In fact, a union exercises less discretion in the processing of a grievance than, for example, in the interpretation of a collective bargaining agreement. *Id.* at 919. As plaintiff notes, in assisting an employee in a grievance proceeding, the union representative acts in a capacity similar to that of a lawyer representing a client in court. *Id.* It is unreasonable, however, "to expect union officials to meet the same standards expected of an attorney in a court of law." *Id.* at 920. "[C]ertain acts or omissions by a union official representing a grievant, while actionable if done by an attorney, would not constitute a breach of the union duty of fair representation." *Id.* Moreover, "[i]t is not the court's role to second-guess tactical decisions made by employees' duly appointed bargaining representative." *Griffin v. Air Line Pilots Assoc., Int'l,* 32 F.3d 1079, 1083 (7th Cir. 1994). Thus, in order to prove that Local 600 breached its duty of fair representation, plaintiff must produce evidence that its conduct toward plaintiff was "arbitrary, discriminatory, or in bad faith." *Crider*, 130

F.3d at 1243. "In order to successfully defend against a motion for summary judgment on a duty of fair representation claim, the plaintiff must point the court to record evidence supporting any one or all of these elements." *Griffin*, 32 F.3d at 1083.

The "arbitrary" analysis is an objective, highly deferential test: to be arbitrary, Local 600's conduct toward plaintiff must be "so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." *Crider*, 130 F.3d at 1243, *citing Air Line Pilots Ass'n v. ONeill*, 499 U.S. 65, 78 (1991). Discrimination and bad faith, on the other hand, are determined by looking at the subjective motivation of the union officials. *Id.*

In his response to defendants' motions for summary judgment, plaintiff does not directly label Local 600's conduct as arbitrary, discriminatory, or in bad faith. Rather, plaintiff argues that Local 600 breached its duty by failing to present the arguments most beneficial to plaintiff's case and failing to conduct a meaningful investigation into plaintiffs case. Specifically, plaintiffs claims can be categorized as follows. He asserts that Local 600: (1) wrongfully failed to provide plaintiff with an attorney; (2) failed to present adequate evidence that plaintiffs behavior did not constitute sexual harassment; and (3) failed to research the law and interview a sufficient number of witnesses. The Court will examine these claims in turn.

As a preliminary matter, however, in an apparent attempt to have his claims considered under a discrimination or bad faith analysis, plaintiff alleges, without citing to the record or providing affidavits or other evidence in support of his allegation, that "acrimonious relationships" existed between himself and unnamed

union officials, and that this alleged hostility is relevant to determining Local 600's motivation in processing his grievance. Plaintiff neither identifies the substance of these "acrimonious relationships" nor introduces evidence to support an inference that any alleged hostility affected Local 600's representation of plaintiff. *See, e.g., Crider*, 130 F.3d at 1243-44 (discrimination and bad faith claims rejected where plaintiff failed to identify any union conduct to suggest union treated him with disfavor). On the contrary, Local 600 protested plaintiff's discharge and pursued the grievance procedure as far as the CBA would allow. Thus, plaintiffs claims will be considered under an "arbitrary" analysis.

As to the first of plaintiffs claims, the discretion accorded to the union includes a right to limit the role of outside attorneys in a grievance proceeding. *See Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1179 (7th Cir. 1995). A decision of a union not to allow outside representation, standing alone, is insufficient to show that the union acted arbitrarily. *Id.* at 1179-80. Furthermore, plaintiff admits that he does not know if Local 600 consulted outside counsel or not. Thus, plaintiffs bald assertion that "Local 600 took no action whatsoever to assist [plaintiff] in this endeavor [to involve an attorney]", without more, is not sufficient to withstand a motion for summary judgment.

Plaintiff next makes a number of assertions that in substance amount to a claim that Local 600 failed to introduce adequate evidence at the local level that plaintiff's conduct did not amount to sexual harassment. Plaintiff contends that Local 600 should have presented the live testimony of Laura Roy, an employee of RTS, to show that she did not believe plaintiff's conduct to be offensive. According to the Stipulation of

Facts, however, Local 600 did introduce witness statements from Roy, and from Nathaniel Rodie, that characterized plaintiff's conduct as "kidding" or "clowning around." Local 600 may have made the strategic choice not to call as a live witness an employee of the opposition, or alternatively, Local 600 may not have been as thorough as it could have been; however, plaintiff has made no showing that the union's conduct was "so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." *Crider,* 130 F.3d at 1243. Moreover, failure to present favorable evidence may constitute a breach of duty of fair representation only if introduction of the evidence would have changed the outcome of the proceeding. *See Garcia,* 58 F.3d at 1176-77. Plaintiff has not alleged facts to show that the outcome of the proceeding would have been different had Roy testified live before the panel.

As to plaintiff's allegations of a failure to research the law and interview witnesses, while Local 600 was required to perform some minimal investigation in plaintiffs case, the thoroughness of investigation depends on each particular case, and "only an egregious disregard for union members' rights constitutes a breach of the union's duty." *Id.* at 1176. "What is required to be shown goes considerably beyond the requirements of a malpractice suit." *Id.* In the present case, plaintiff fails to introduce evidence that Local 600 did not research the law; in fact, plaintiff admits that he does not know if Local 600 consulted outside counsel. Moreover, Local 600 did interview witnesses. With the exception of Genise Talley herself, plaintiff fails to identify what other "potential witnesses" Local 600 should have interviewed; however, the uncontroverted evidence shows that Talley refused to talk with the union. Plaintiffs

unsupported allegations cannot withstand summary judgment.

In this matter, Local 600, *inter alia*, protested plaintiff's discharge and commenced the grievance process, successfully challenged RTS's right to proceed under Article 37 of the CBA (a result which plaintiff admits helped his case), interviewed witnesses, presented witness statements to the grievance committees stating that plaintiff's conduct was merely "kidding" and "clowning around," allowed plaintiff to make a number of arguments on his own behalf at the local hearing, advanced the argument that sexual harassment is not a "cardinal infraction" allowing immediate termination, and pursued plaintiff's grievance as far as the CBA would allow. Plaintiff has failed to produce evidence to support a finding that Local 600's conduct was arbitrary, discriminatory, or in bad faith.

Because plaintiff's duty of fair representation claim cannot survive summary judgment, plaintiff's claim that RTS breached the CBA necessarily fails as well. *See Crider*, 130 F.3d at 1241; *McKelvin*, 124 F.3d at 869; *White v. Gen'l Motors Corp.*, 1 F.3d 593, 595 (7th Cir. 1993).

B. Retaliatory Discharge

RTS argues that summary judgment is appropriate on Count II, the retaliatory discharge claim, because: (1) plaintiff cannot prove a *prima facie* case of retaliatory discharge, specifically, plaintiff has failed to produce any evidence that there is a causal link between his protected activities and his discharge; and (2) even if he can make out a *prima facie* case, plaintiff cannot demonstrate that the articulated reason for his discharge is

a pretext for retaliatory discharge. Plaintiff failed to respond to RTS's arguments on the issue of retaliatory discharge.[5]

In order to succeed on a claim of retaliatory discharge, plaintiff must first establish a *prima facie* case of retaliation. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In order to do so, he must show that: (1) he was engaged in a statutorily protected expression; (2) he suffered an adverse action by his employer; and (3) there is a causal link between the protected expression and the adverse action. *See Adusumilli v. City of Chicago*, 164 F.3d 353,362 (7th Cir. 1998); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1457 (7th Cir. 1994). Once plaintiff makes this showing, the burden shifts to RTS to articulate a "legitimate, nondiscriminatory reason" for the adverse action. *See Adusumilli*, 164 F.3d at 362. If RTS is able to articulate such a reason, the burden shifts back to plaintiff to demonstrate that the proffered reason is pretextual and that the actual reason was discriminatory. *Id.* "Although the burden of production shifts under this method, the burden of persuasion rests at all times on the plaintiff." *Id.* (internal quotations omitted).

The parties do not dispute the fact that plaintiff was engaged in statutorily protected expression and that plaintiff suffered an adverse action by RTS. Rather, RTS claims that plaintiff has failed to produce evidence from which a reasonable fact-finder could conclude that there is a causal link between plaintiff's discharge and

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[5] According to Local Rule 7. 1, "[f]ailure to timely file an answering brief to a motion may, in the Court's discretion, be considered an admission of the merits of the motion."

his filing of a charge of disability discrimination with the EEOC in 1993.[6] Specifically, RTS argues that Mike List, Vice-President and General Manager of RTS, was the sole decision-maker in regard to plaintiff's discharge, and that List was unaware that plaintiff had filed the EEOC charge. It is true that generally there "can be no causal link between protected activity and an adverse employment action if the employer remained unaware of the protected activity." *See Dey*, 28 F.3d at 1458. In the instant case, RTS has introduced uncontroverted evidence that List was the sole decision-maker in plaintiff's case, (List Aff. at ¶¶ 1, 33; Chilton Dep. at pp 39, 53), and that List was unaware that plaintiff had ever filed an EEOC charge.[7] (List Aff. at ¶ 28). Although plaintiff refused to stipulate to the fact that List was the sole decision-maker regarding his termination, plaintiff has not presented evidence to the contrary. Moreover, in his response to RTS's motion for summary judgment, plaintiff even states that " ... in *making the decision to terminate* [plaintiff], *Mr. List* made no investigation ..." In addition, plaintiff has not introduced evidence or argument to support an inference that at the time of plaintiff's termination, List was aware that plaintiff

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[6] In its motion for summary judgment, RTS further argues that plaintiff has failed to establish a causal link between his discharge and his filing of filing workers' compensation claims in 1995 and 1997, an unfair labor practice charge with the National Labor Relations Board in 1997, and a complaint with the Occupational Health and Safety Administration in 1997. Argument on these issues is unnecessary because although Count I discusses the filing of these claims, count II alleges retaliatory discharge based only upon the filing of the 1993 EEOC claim.

[7] List also stated that he had no knowledge the plaintiff had ever filed any workers' compensation claims, unfair labor practice charges, or OSHA complaints. (List Aff. at ¶ 28).

had filed an EEOC charge, or any other claims. The Court concludes that there is no issue of material fact as to whether List was the sole decision-maker in plaintiff's case and whether List was unaware of plaintiff's alleged protected activities.

RTS further argues that plaintiff's discharge did not occur soon enough after the filing of the EEOC charge to show a causal link. A plaintiff may establish a causal link by introducing evidence that "the discharge took place on the heels of protected activity." *See Adusumilli*, 164 F.3d at 363 (internal quotations omitted). In the present case, plaintiff's was terminated in July 1997, almost four years after he filed an EEOC charge. It is difficult to see how his termination could be termed "on the heels" of his filing the charge. *See, e.g., Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 746 (7th Cir. 1999) (absent other evidence to show plaintiff was fired for exercising a protected right, gap of three years between exercise of right and termination is insufficient to show causal link).

For the foregoing reasons, plaintiff has failed to present evidence to demonstrate a genuine issue of material fact regarding the alleged causal link between the protected activities in which plaintiff engaged and plaintiff's termination. It is thus unnecessary to address the alternative grounds for RTS's motion for summary judgment as it relates to plaintiff's retaliatory discharge claim.

CONCLUSION

Accordingly, the Court **GRANTS** defendants' motions for summary judgment, and judgment is entered in favor of defendants Rail Terminal Services and Teamsters Local 600, and against plaintiff James Askew. The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

DATED: November 1, 1999

/s/ William Stiehl

DISTRICT JUDGE

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT- WITHOUT ORAL ARGUMENT

Date: December 6, 2000

BEFORE: Honorable RICHARD A. POSNER,
Circuit Judge

Honorable FRANK H. EASTERBROOK,
Circuit Judge

Honorable ANN CLAIRE WILLIAMS,
Circuit Judge

Nos. 00-1266 & 00-2177

JAMES J. ASKEW,
Plaintiff - Appellant

v.

UNION PACIFIC RAILROAD COMPANY, RAIL TERMINAL SERVICES, TEAMSTERS LOCAL 600, et al.,
Defendants - Appellees

Appeals from the United States District Court for the Southern District of Illinois No. 98 C 191, William D. Stiehl, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1060-110393)

UNPUBLISHED ORDER

Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 5, 2000*
Decided December 6, 2000

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

Nos. 00-1266, 00-2177

JAMES J. ASKEW,
Plaintiff-Appellant,

UNION PACIFIC RAILROAD CO., et al.,
Defendants-Appellees.

William D. Stiehl, *Judge.*

Appeal from the United States District Court for the
Southern District of Illinois
Nos. 98-CV-191-WDS, 99-CV-823-WDS

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*After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

ORDER

In March 1998 James Askew filed a hybrid action under the Labor Management Relations Act, 29 U.S.C. § 185, alleging that his employer, Rail Terminal Services (RTS), breached its collective bargaining agreement with his union, Teamsters Local 600 (Union), by firing him for sexual harassment, and that the Union violated its duty of fair representation. Askew also alleged that his discharge was in retaliation for filing complaints with the EEOC, OSHA, and the National Labor Relations Board (NLRB). Askew then filed a second suit asserting basically the same claims. The district court granted summary judgment to the defendants in Askew's first suit. In a later order, the district court dismissed Askew's second suit on res judicata grounds. Askew appeals and we affirm.

Askew began working for Union Pacific Railroad's (UPR) subsidiary, Union Pacific Motor Freight (UPMF), as a truck driver in 1974. Askew divided his time between making deliveries in the city, and moving trailers on the yard as a "spotter." When RTS purchased UPMF from UPR in February 1997, Askew became a full-time spotter. Askew is a member of the Union, which has a collective bargaining agreement with RTS.

Through his employment as a spotter, Askew would occasionally come into contact with Genise Talley, an independent contractor who had contracted with UPR to drive trailers from the Dupo, Illinois facility where Askew worked. During the week of July 14, 1997, Askew temporarily filled in as a trailer inspector for an employee who was out on leave. As a trailer inspector, Askew had frequent contact with Talley.

On July 18, 1997 Talley complained to RTS's manager Brad Chilton that Askew had been sexually harassing her over the previous two years. Specifically, she stated that on numerous occasions, Askew said to her "you're my woman," "you're coming home with me tonight," "when are you getting off so we can go home," and "Genise takes care of me, she rubs and massages me." Talley also asserted that Askew once placed his hand 6 to 8 inches from her breasts, turned them in a rotating manner, and stated "let me show you how I play T.V. repairman ... see, this is how I tune the knobs." Furthermore, Talley stated that Askew repeatedly asked to hug her, placed his hands around her waist, and stated that he was going to "kick [her husband's] ass." Many of these comments were made in the presence of others, including Talley's husband.

Chilton immediately began an investigation of Talley's complaints. Askew admitted to making all but one of the comments but claimed that they were jokes and that the touching was not sexual in nature. On July 18, 1997 RTS's General Manager Mike List, whom Chilton had apprised of the situation, ordered Chilton to suspend Askew pending further investigation. In the presence of a union representative, Chilton telephoned Askew and told him of his suspension. Chilton also sent Askew a letter informing him that he was being suspended under Article 46 of the collective bargaining agreement. Chilton then continued his investigation by interviewing four individuals whom Talley had identified as witnesses. These witnesses corroborated Talley's story in signed, written statements. Chilton forwarded these statements to List, who then terminated Askew on July 3 1, 1997. List believed that he had "just cause" to fire Askew under Article 46 because Askew's sexual harassment

violated both the law and company policy, and jeopardized RTS's contract with Talley and UPR. Furthermore, he believed that Askew's sexual harassment violated Article 37, which generally prohibits management and union officials from discriminating on the basis of gender.

Askew and the Union filed a number of complaints over his suspension and termination. The challenges pressed three points. First, they claimed that Article 37 was inapposite because it applied only to management and union officials, not individual employees. Second, they asserted that his suspension was improper because Article 46 authorized an employee to remain on the job until his discharge is sustained under the grievance procedures, unless the employee committed a "cardinal" infraction. Askew and the Union asserted that sexual harassment was not a cardinal infraction. Finally, they argued that his discharge was improper because Article 46 required one written warning before an employee is fired for just cause, and Askew never received such a warning. Article 46 exempts certain infractions from this written notification requirement, but sexual harassment is not listed as one of those exceptions.

The Union proceeded to pursue Askew's grievance through three levels of hearings before panels composed of three union representatives and three management representatives. The first two panels split 3-3 on whether to uphold Askew's termination. On September 9, 1997 the third panel voted to uphold Askew's termination, but awarded him back pay retroactive to the date when he was suspended.

Askew filed suit over his termination in March 1998. He alleged that the Union violated its duty of fair representation by conspiring with RTS to let his termination stand. Specifically, Askew alleged that he had an acrimonious relationship with Union officials, and that the Union failed to adequately investigate his case, consult with an attorney, determine whether his conduct violated the law, or present important evidence. Askew next asserted that RTS violated the collective bargaining agreement by not allowing him to work while his grievance was pending, and by firing him without a warning. Askew then claimed that RTS actually fired him in retaliation for filing complaints with the EEOC, OSHA, and the NLRB. Askew also named as defendants the International Brotherhood of Teamsters (IBT) and UPR. Soon after filing his complaint pro se, Askew obtained counsel.

While summary judgment was pending in the first case, Askew filed a second pro se complaint reiterating his allegations against RTS and the Union. The only new information in this complaint was Askew's allegation that List's deposition testimony shows that List made false statements to the grievance committees.

After the parties agreed to dismiss all charges against the IBT because it was not a proper party to the case, the district court decided the first case in November 1999 by granting summary judgment to the defendants. The court found that there was no evidence that UPR was Askew's employer after RTS's purchase of UPMF in February 1997. Because UPR was not Askew's employer at the time of his discharge, it could not be held liable for any of the activity surrounding, that discharge. The district court granted summary judgment on the hybrid breach of collective bargaining agree-

ment/duty of fair representation claim because Askew had failed to demonstrate a triable issue over whether the Union violated its duty of fair representation. Finally, the district court rejected Askew's retaliation claim because there was no evidence that List, who made the decision to terminate Askew, knew about the complaints filed by Askew. In January 2000 the district court denied Askew's pro se motion under Rule 59(e) to set aside or amend the judgment. In April 2000 the district court dismissed Askew's second case on res judicata grounds. We have consolidated Askew's timely appeals in both cases.

Askew's appellate briefs, while difficult to decipher, appear merely to repeat his arguments before the district court that he was fired by RTS unfairly and in retaliation for protected activity and that the Union failed to fairly represent him in challenging his termination. First, we agree with the district court that Askew failed to establish a triable issue in his hybrid breach of the collective bargaining agreement/duty of fair representation claim. A claim that an employer breached a collective bargaining agreement will not succeed unless the employee can also demonstrate that the union violated its duty of fair representation. *See Filippo v. Northern Ind. Public Serv. Corp.*, 141 F.3d 744, 748 (7th Cir. 1998); *White v. General Motors Corp.*, 1 F.3d 593, 595 (7th Cir. 1993). In order to establish that the Union violated its duty of fair representation, Askew was required to show that the Union's actions in representing him were arbitrary, discriminatory, or in bad faith. *See McKelvin v. E.J. Brach Corp.*, 124 F. 3d 864, 867 (7th Cir. 1997).

The district court was correct that Askew did not establish that the Union either acted in bad faith or

discriminated against him. Askew's allegations of bad faith and discrimination relied on his claim that he had an acrimonious relation with Union officials. Askew, however, did not identify any individuals with whom he had a bad relationship, nor did he cite to any evidence in support of this allegation. *See Crider v. Specturlite Consortium, Inc.*, 130 F.3d 1238, 1244 (7th Cir. 1997).

As for his claim that the Union's representation of him was arbitrary, Askew was required to demonstrate that the Union's actions were "so far outside a 'wide range of reasonableness' as to be irrational." *See Filippo*, 141 F.3d at 749. He did not do so. Askew criticized the Union for not having an attorney present at his grievance hearings, for not determining if his actions were illegal, for not having witnesses testify at his hearings, and for not fully investigating and presenting his case. The failure to provide a lawyer, however, does not violate the duty of fair representation. *See, e.g., Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1180 (7th Cir. 1995) (union may exclude independently retained attorney from grievance procedures;- *Baxter v. United Paperworkers Int'l Union, Local 7370*, 140 F.3d 745, 747 (8th Cir. 1998) (same); *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1483 (9th Cir. 1985) (holding meritless plaintiffs argument that he was entitled to counsel at arbitration hearing). As for the claim that the Union did not determine whether Askew's actions were illegal, the Union in fact attempted to downplay the seriousness of the alleged harassment by presenting statements of two witnesses who stated that they believed Askew was merely joking around with Talley. Finally, Askew's claim that the Union did not fully investigate or present his case is belled by the fact that the Union interviewed a number of witnesses, met with RTS officials when

Askew was first suspended, and raised his arguments about suspension and termination before three different hearing panels. *See, e.g., Garcia*, 58 F.3d at 1177-80. Furthermore, Askew acknowledged at each hearing that he was satisfied with his Union's representation and he actually was awarded back pay because the final grievance panel found that he improperly had not been allowed to work while awaiting a decision on his grievance. *See, e.g., Souter v. International Union, United Auto., Aerospace & Agric. Implement Workers of America*, 993 F.2d 595, 598 (7th Cir. 1993).

We agree with the district court that Askew also did not establish a *prima facie* case for retaliatory discharge. To make out a *prima facie* case, Askew had to show that he engaged in protected activity, that he suffered an adverse employment action, and that there was a causal link between the protected activity and the adverse action. *See Adusumilli v. City of Chicago,* 164 F.3d 353, 362 (7th Cir. 1998). Askew engaged in protected activity because he filed a complaint with the EEOC in 1993 alleging violations of the Americans with Disabilities Act, filed workers' compensation claims in March 1995 and June 1997, and filed a complaint with OSHA in June 1997 over workplace conditions. Askew, however, did not show that his termination was causally linked to these complaints because he offered no evidence that the decision maker in his termination, List, even knew that Askew had filed these complaints. *See Maarouf v. Walker Mfg. Co.*, 210 F.3d 750, 755-56 (7th Cir. 2000); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994). Askew never challenged List's affidavit testimony denying knowledge of Askew's complaints and in fact Askew admitted at his deposition that he had no reason to believe that List knew about these complaints.

Askew also argues on appeal that summary judgment was improper as to UPR because UPR was his employer by virtue of the fact that UPR controlled RTS's operations and was therefore also liable for his improper and retaliatory discharge. This argument, however, is foreclosed because Askew entered into a stipulation before the district court in which he acknowledged that he was "suing UPR only because he believes (incorrectly) that RTS was and is a wholly owned subsidiary of Defendant Union Pacific, and Defendant Union Pacific controls all operations and acts of Defendant RTS'... and that RTS and UPR are 'one and the same.'" Furthermore, UPR presented uncontroverted testimony that it never controlled any of RTS's operations or had any corporate affiliation with. Finally, Askew failed to respond to UPR's motion for summary judgment and therefore he has conceded that UPR's version of the facts are true. *See Day v. Northern Ind. Pub. Serv. Corp.*, 164 F.3d 382, 383-84 (7th Cir. 1999); *Flynn v. Sandahl*, 58 F.3d 283, 288 (7th Cir. 1995). These facts establish that UPR had no control over RTS's actions and was therefore not liable for Askew's discharge.

Askew also challenges the dismissal of all claims against the IBT. Before the district court, however, Askew stipulated that IBT had never been a signatory to the collective bargaining agreement at issue, and soon thereafter he agreed to dismiss all claims against IBT with prejudice under Federal Rule of Civil Procedure 41(a)(1)(ii). Askew now asserts that these actions were taken by his attorney without Askew's permission. But Askew is responsible for the actions of his counsel, and so even if his unsupported allegation is true it would at most justify a malpractice action by Askew against counsel. *See Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801-02 (7th th Cir. 2000).

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

JAMES ASKEW,
Plaintiff,

V.

UNION PACIFIC RAILROAD CO.
Serve: C.T. Corporation
208 South LaSalle
Chicago, IL 60604 and

RAIL TERMINAL SERVICES
Highway 3 and East Carondelet
P.O. Box 40
Dupo, Illinois, and

TEAMSTERS LOCAL 600
Affiliated with the International Brotherhood of
Teamsters, Chauffeurs, Warehousemen
& Helper of America AFL-CIO
9401 Riverview Ave., St. Louis, MO 63137 and

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS
25 Louisiana Ave., N.W.
Washington, D.C. 2001

Defendants.

Cause No. 98-191-WDS

JURY TRIAL DEMANDED

Filed March 6, 1998

COMPLAINT

Comes now the plaintiff and for his cause of action against the defendants states as follows:

Jurisdiction

1. This is an action brought under the provisions of the National Labor Relations Act, 1947, Section 301, and 29 U.S.C. § 185 and this Court has jurisdiction pursuant to the provisions of 28 U.S.C. 1331, 1332, 1343 and 1367. This Court also has Jurisdiction under the provisions of Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq., the Civil Rights Act of 1991, the Occupational Safety & Health Act., 29 U.S.C. §651 et seq.

Parties

2. Plaintiff, James Askew, is a citizen of the United States, a resident of the State of Missouri and a former employee of defendant railroad and a member of defendant Union.

3. Defendant Union Pacific Railroad (Railroad) is a corporation authorized to do business in the State of Illinois and maintains a railroad in said state.

4. Defendant Rail Terminal Services (Terminal) operates a terminal service in the state of Illinois and is an agent of defendant Railroad and at all times mentioned herein was acting within the scope of its agency.

5. Defendant Teamsters Union Local 600 is affiliated with the International Brotherhood of Teamsters, AFL-CIO, and is the collective bargaining agent for certain employees of the defendant Terminal including the plaintiff and defendant International Brotherhood of Teamsters (International) is charged with enforcing the

terms of the National Master Freight Agreement which governs the contractual employment relationship of plaintiff and defendants.

6. Plaintiff reported certain actions of the Terminal to O.S.H.A. for failing to report various accidents and O.S.H.A. fined defendant Terminal $800 for failure to report said accidents.

7. On or about the 31st day of March, 1993, plaintiff was not returned to work by defendant after his heart attack and plaintiff filed an EEOC complaint and thereafter a settlement was reached resulting among other things in plaintiff's return to work.

8. On July 18, 1997 plaintiff was suspended subject to discharge from his employment with the Terminal for alleged misconduct.

9. On July 23, 1997 plaintiff filed a grievance alleging among other things that his suspension was in violation of the provisions of the Master Freight Agreement.

10. On July 31, 1997 defendant Terminal discharged the plaintiff.

11. Plaintiffs grievance of July 23, 1997, then became a discharge grievance and plaintiff alleged that his discharge was in violation of the provisions of the Master Freight Agreement and in retaliation for his prior protected activities.

12. Plaintiffs prior protected activity involved (a) reporting accident situations to OSHA, (b) filing an EEOC complaint based on disability under the American Disabilities Act, (c) filing a charge with the National Labor Relations Board opposing certain acts of the leadership of the Union, and (d) filing a workers compensation claim.

13. Defendant Union failed to fairly and adequately represent the plaintiff, and the actions of the Union in representing him in the discharge grievance were arbitrary, discriminatory and deliberately done with dishonesty, in bad faith, and designed to punish plaintiff for his prior protected activity, said actions consisting of one or more of the following acts:

a) The Union Steward testified falsely against plaintiff and the Terminal was reported to have paid said Union steward for his lost time;

b) The Union failed to interview plaintiff's witnesses;

c) The Union failed to take any action to enforce complaint with the National Maters Freight Agreement;

d) The Union allowed issues to be brought into the grievance hearing which were not covered in the National Master Freight Agreement;

14. Plaintiff has exhausted all administrative remedies reasonably available to him including internal union appeal procedures in that any such internal appeals would be useless in view of the deliberate and intentional actions of the defendant Union.

15. That the actions of the defendants has caused plaintiff great emotional distress, loss of pay, seniority and benefits.

16. That the actions of the defendants were deliberate and intentional and done with malice or with reckless disregard to the rights of plaintiff and plaintiff is entitled to compensatory and punitive damages.

WHEREFORE, Plaintiff prays for trial by jury and for the following relief:

a) Restoration to his job with full back pay, full benefits and restoration of full seniority rights.

b) Compensatory damages for emotional distress, damage to his reputation and his good name in the sum of $300,000.

c) Punitive damages in the sum of One Million Dollars ($1,000,000,);

d) Reasonable attorney fees, his cost incurred herein including the cost of expert witnesses and for such other and further relief as may be proper in the circumstances.

/s/ James Askew
James Askew - Pro Se
P.O. Box 3436
St. Louis, MO 63143-0436

APPENDIX D

Department of Employment Security
4519 W. Main St. P.O. Box 23650
Belleville, IL 62223

487-44-5471

Date: 08-07-97

James J. Askew
P.O. Box 3436
St. Louis, MO 63143

RAIL TERMINAL SERVICES LLC

The following determination has been made in connection with your claim for unemployment insurance benefits:

The claimant was discharged from RAIL TERMINAL SERVICES because of AN ALLEGATION OF SEXUAL HARASSMENT.

The term misconduct means the deliberate and willful violation of a reasonable rule or policy of the employer if the violation has harmed the employer or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employer. In this case, the claimant's action which resulted in his discharge HAS BEEN DENIED BY THE CLAIMANT TO BE TRUE AND THE BURDEN OF PROOF IS ON THE EMPLOYER.

Therefore, this Determination finds the claimant eligible for benefits, with respect to this issue only, for each week during the period from 07-20-97 through 08-02-97

and he will be determined eligible for each week thereafter as long as he meets the eligibility requirements of the Illinois Unemployment Insurance Act.

Benefits payable by check are being ordered for each week of unemployment for which you are eligible. If you do not receive payment within three weeks from the date of this notice, please notify the office.

SEE THE REVERSE SIDE FOR INFORMATION REGARDING APPEAL RIGHTS.

VEASE ALL REVERSO PARA UNA TRADUCCION EN ESPANOL DE SUS DERECHOS A APELAR.

William J. Koch - 185
E.S. Service Representative
618-277-5678

ARTICLE 46. DISCHARGE OR SUSPENSION

Subject to the provisions of Article 8 of the Master Freight Agreement, the Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Local Union and job steward affected, except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is proven dishonesty or drunkenness, which may be verified by a sobriety test. Refusal to take a sobriety test shall establish a presumption of drunkenness. Extension of a coffee break or lunch period for a minimal amount of time shall not be considered dishonesty per se, so as not to require at least one (1) warning notice prior to discharge or suspension. Prior warning

notice is not required if the cause of discharge is: drug intoxication as provided in Article 35, Section 3, of the Master Freight Agreement; the possession of controlled substances and/or drugs either while on duty or on company property; recklessness resulting in serious accident while on duty; carrying of unauthorized passengers; failure to report any accident which the employee is aware of; failure to meet the minimum requirements for safe driving under Paragraph 391.25 of the Motor Carriers Safety Regulations issued by the Department of Transportation; or unprovoked physical assault on a company supervisor while on duty or on company property. Warning letters must be postmarked no later than ten (10) days following the Employer's knowledge of the violation, except in those cases where a letter of investigation was issued within such ten (10) day period. Letters of investigation for accidents shall be valid for forty (40) calendar days from the date of the accident.

Except in cases involving "cardinal" infractions under this Supplemental Agreement, an employee to be discharged or suspended shall be allowed to remain on the job until the discharge or suspension is sustained under the grievance procedure.

The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. The nine (9) month time period shall apply uniformly throughout the Supplemental Area. Habitual absenteeism or tardiness shall subject an employee to disciplinary action in accordance with the procedure outlined herein.

Discharge must be by proper written notice to the employee and the Union affected. Any employee may

request an investigation as to his discharge or suspension. Should an investigation prove that an injustice has been done an employee, he shall be reinstated. The Committees established by the Supplemental Agreement and the Master Agreement shall have the authority to order full, partial or no compensation for time lost. Appeal from discharge, suspension or warning notice must be taken within ten (10) days by written notice, and a decision reached within thirty (30) days from the date of discharge, suspension or warning notice. If the employee involved is not within the home terminal area when the action of discharge, suspension or warning notice is taken, the ten (10) day period will start from the date of his return to the home terminal. If no decision has been rendered on the appeal within thirty (30) days, the case shall then be taken up as provided for in Article 45, Section 1, of this Agreement.

Any employee discharged away from his home terminal shall be provided the fastest available transportation to his home terminal at the Employer's expense.

Uniform rules and regulation's with respect to disciplinary action may be drafted for each state, but must be approved by the Joint State Committee for such state and by the Joint Area Committee. Such approved uniform rules and regulations shall prevail in the application and interpretation of this Article.

APPENDIX E

RAIL TERMINAL SERVICES
P.O. Box 40
DUPO, IL 62239
618-286-0479 FAX: 618-286-0412

DISCHARGE LETTER
Certified Mail Return Receipt Requested
No. P 277 518 277

Mr. James J. Askew
P.O. Box 3436
St. Louis MO 63143

Dear Mr. Askew:

We have concluded our investigation concerning the incidents of your Sexual Harassment of Mrs. Genise Talley, a female driver, during the week of July 14, 1997.

In accordance with Article 46 and Article 37 of the National Master Freight Agreement and Local Cartage Supplemental Agreement this discharge is for Just Cause and Discriminatory Acts Prohibited by Law.

All monies due you will be sent to the address of record noted above, except vacation pay which is being withheld in accordance with Article 23 of the National Master Freight Agreement.

Sincerely,

/s/ Brad Chilton
Brad Chilton
Terminal Manager

cc: Mr. R.M. "Mike"- Vice President & General Manager, RTS
Mr. Danny Moore-Assistant General Manager, RTS
John Fisher, President & Business Agent
Certified Mail Return Receipt Requested No. P27751
8276 Teamsters Local 600 9041
Riverview Dr.
St. Louis MO 63137
Donald Green, Job Steward

Statement of Policy Applicable to the Sale and Distribution of the Central States Area Contract Guide

The Contract Guide covering the National Master Freight Agreement and the Central States Supplemental Agreements is compiled, copyrighted and marketed by a Guide Committee composed of the Managers of MCEC of Central States Labor Relations Associations.

The content consists of selected Central States Joint Area Committee and National Grievance Committee decisions in precedent setting cases and interpretations applicable to the National Master Freight Agreement and the Central States Area Local Cartage and Over-The-Road Supplemental Agreements, augmented with Bulletins prepared and/or distributed by the Central Conference of Teamsters, Motor Carrier Employers Conference - C.S., International Brotherhood of Teamsters and Trucking Management, Inc.

The "Guide" is available for purchase on a three-year subscription basis to Carrier Management, Employer Associations signatory- to the National Master Freight Agreement and or the Central States Area Over-The-Road and Local Cartage Supplemental Agreements. Officers of the International Brotherhood of Teamsters, Affiliated Conferences, Joint Councils and IBT Local Unions.

ARTICLE 46

DISCHARGE OR SUSPENSION

Contract Text: UNIFORM RULES AND REGULATIONS

Reference Note: See Article 43, Section 1 providing for termination of seniority in case of voluntary quit; Article E of Ohio Rider covering discharge, suspension, or voluntary quit, in the State; and the Uniform Rules and Regulations covering grievances as adopted and effective in such states as Michigan, Nebraska and Indiana. (See Article 35, Section 3 re: "drug abuse".)

Comment: The Contract provides in Section I of Article 43 that seniority, and therefore the employment relationship with a given Carrier, is severed upon a "voluntary quit" by the employee. Obviously, when a voluntary quit occurs, the Contract text has no application and such former employee has no rights under this Article. Notwithstanding the simplicity of this fact, JAC is confronted occasionally with the necessity of determining whether there has, in fact, been a voluntary quit upon the part of an employee. The issue is usually raised by an act of an employee such as walking off the job, failing to report for work, or neglecting to return to duty after leave of absence.

Such act by the employee may or may not be intended as an actual quitting of his employment. The Carrier, however, may interpret the employee's act as a quit and if such assumption upon the part of the Carrier is contested thereafter by either the employee or Union, the issue is settled through resort to the grievance procedure. In some instances the position of the Carrier has been sustained by JAC. In other cases, however,

JAC has found the circumstances to be such that the employee was justified in his act or that the Carrier should have treated the incident as a disciplinary matter in conformity to the Contract text.

An employee normally does not have the right to walk off the job or refuse to pull a run. His remedy is to stay on the job or perform his duty and to file a grievance. This responsibility of the employee and business agent was pointedly stated by the Chairman, Central States Drivers Council, in a 1955 JAC decision:

"I want you drivers to take sound notice that this Contract is meant to be lived up to and if you have a complaint, you reduce it to writing, turning it in to the business agent, and he will process it accordingly; and if you have any complaint, you follow ARTICLE 46, and if you don't do it, we'll penalize the man that's responsible in such a way that he won't forget it the next time the case comes in here": Local 710 vs. Riss & Co., C#38, JAC, Mar. '55 (Art. 10).

The act of an employee in failing to perform his duty man result from infinitely variable circumstances such as misunderstanding of instructions, emergency, or other causes not justifying complete loss of seniority. Such possibilities make it imperative that the Carrier carefully examine its position in all voluntary quit cases where its position may be challenged. ARTICLE 46

In a number of states such as Michigan and Nebraska the provisions of the Contract text are in part altered or modified as a result of uniform rules and regulations adopted in such States; and in Ohio discipline is in part governed by Article E of the Ohio Rider. Consequently, Carriers who operate in such states must have knowledge of and comply with the various rules effective

therein governing discipline and grievances. Failure to comply with such uniform rules and regulations in imposing discipline will result in reinstatement: Local 554 vs. Burlington Truck Lines, C#27, JAC, Dec. '55.

Adoption of such uniform rules by various states evidences recognition generally given to the principle of predetermined discipline based upon known and expected common employee acts of commission or omission which normally may be feasibly regulated or controlled through establishment of such rules.

The addition of the words "or suspension" to the Contract text (2-1-55) had the effect of placing the two principal disciplinary actions available to a Carrier upon the same basis of accurate and adequate prior warning notice of the charge or complaint against the employee. The inclusion of these words in the Contract creates a more stable method of accomplishing suspension, where it is warranted, and reduces materially the difficulties formerly experienced in justifying suspension with resultant loss of earnings to the employee.

The imposition of suspension or discharge can be effected only after prior warning notice except in the limited discharge causes specifically enumerated in the Contract text. This requirement of a prior warning notice letter has created some difficulty. It is clear that such warning notice cannot be overlooked or ignored since failure to provide the notice will result in reinstatement of the discharged employee. Moreover, a warning notice may not support a subsequent discharge when the infraction even with its repetition may be insufficient to warrant discharge. Not infrequently the reinstatement of a discharged employee by JAC will result due to the fact that the warning notice is given

with respect to one form of infraction or improper conduct while the actual discharge is imposed upon a different infraction or form of misconduct. The warning notice or letter in order to be adequate and effective in sustaining a subsequent discharge must have been issued for a similar or related Contract violation, rule infraction or type of improper conduct.

In many instances when an employee is ordered reinstated by JAC, the latter will direct that the letter or notice of discharge be treated as a warning notice: Local 710 vs. Burlington Truck Lines, C#12, JAC, Mar. '55; Local 710 vs. Consolidated Freight Ways, C#14, JAC, Mar. '53; Local 89 vs. Hayes Freight Lines, C#46, JAC, Mar. '55. In other situations, though JAC may decree reinstatement of the employee, the degree of the latter's fault is such that JAC also directs the issuing of a warning notice: Local 135 vs. Hargis Truck Lines, C#32, JAC, Mar. '54; Local 662 vs. Briggs Transportation Co., C#52, JAC, Dec. '55. On appropriate occasions JAC may accompany its order of reinstatement with a verbal admonition to the employee as in the case of Local 554 vs. Red Ball Transfer Co., C#34, JAC, Dec. '55 where the employee was told, "You are not to take the position when your eight-hour statutory time is up that you still have the balance up to 15 hours to go out. Any time after the eight hours that the Company has a load of freight for you, in line with your place on the board, that freight goes out."

Justification for discharge or discipline is the salient point of the Contract text. What constitutes justification must obviously be dependent upon the particular facts and circumstances, and can only be determined on a case by case basis. Experience seems clearly to indicate that good reasonable supervision uniformly applied

within the terms of the Contract, without discrimination and without heat, will assure the soundness of the Carrier's position in disciplinary matters. Conversely, erratic disciplinary methods with the appearance of discriminatory application may color all of a Carrier's disciplinary action.

Beyond the necessity of justification for imposition of discipline is the equally important need for ample proof thereof. When an employee appeals from an imposed discipline, it is not enough that the Carrier considers the action taken as justifiable, since "just cause" is a conclusion reached after examining and weighing all the relevant facts. A Carrier must be prepared to establish such facts by proof before JAC or other grievance committees when its action is challenged. Any guessing or laxity in this connection upon the part of a Carrier usually accounts for the failure to make its disciplinary action stick.

Broad remedial authority is exercised by JAC in reversing or modifying disciplinary action imposed by a Carrier. The normal rule applied when a discharge is held to have been improper is that the discharged employee be reinstated with back pay less monies earned by him while out of the Carrier's service. In many cases the employee ordered reinstated is also at fault in more or less substantial degree. Recognition of this situation by JAC is indicated by the nature of its decision. Reinstatement is frequently ordered without back pay, and in at least one case reinstatement was ordered with payment of "one-half of the wages lost because of improper discharge": Local 600 vs. Superior Forwarding Co., C#51, JAC, Mar. '54. Reinstatement without back pay may be ordered by JAC and the actual reinstatement delayed by the Committee for an additional period following the

date of its decision: Local 662 vs. Briggs Transportation Co., C#52, JAC, Dec. '55. As noted previously reinstatement may be ordered with the qualification that the discharge notice serve as a warning notice, or with a direction that the reinstated employee be issued a warning notice.

Discharge cases make up an unduly large portion of agendas of State Committees and of the Area Committee. It is in this area of dispute that much controversy is experienced. It should be noted as a general proposition that Joint State Committees made up of Employers and Union personnel with their better opportunities to resolve these disputes on "home ground" should dispose of more of these disputes. The record appears to indicate a hazard for Employers existing at JAC when all possible effort to settle a discharge dispute has not been made beforehand.

The quarterly meetings of the JAC create a condition where its decision cannot be secured until after lengthy delays running in some instances to ninety days. This condition of unavoidable delay builds up large lost-time pay claims, continues for those periods of time whatever injustice exists on either side of the dispute, and places on JAC the burden of attempting to reach a just decision in an atmosphere where salient facts are often absent or possibly have been pushed to the background by the animosity and bitterness created in the prior attempts at adjustment of the dispute.

It seems worthy of note that the inherent elements of Cie Employer-employee relationship, the value placed on an employee's seniority, the fringe benefits of considerable value to the employee, the probable future value of such fringes to the employee, all tend to set up ever-

increasing resistance to discharge. The Employer must make certain that his supervision in taking disciplinary action is founded upon facts and good judgment.

Clause Application: Failure to comply with or properly apply the provisions of the Contract text in imposing discipline or discharge will result in reinstatement of the employee by JAC: Local 710 vs. Burlington Truck Lines, C#12, JAC, Mar. '55: Local 710 vs. Keeshin Motor Express, C#36, JAC, Mar. '54.

When circumstances establish a voluntary quit upon the part of an employee with resultant loss of seniority in accordance with ARTICLE 43, the Contract text is inapplicable and the employee has no rights thereunder: Local 632 vs. Watson Brothers Transportation Company, C#40, JAC, Dec. '52; Local 327 vs. Terminal Transport, C#29, JAC, Sept. '53; Local 42. vs. Riss & Company, C#31, JAC, Mar. '55.

A warning notice, in order to be effective in sustaining a subsequent discharge, must have been issued for misconduct, Contract violation, or rule infraction similar or related to that on which the discharge action is taken: Santa Fe Trails Company vs. Local 795, C#32, JAC, Sept. '52.

Discipline or discharge imposed for just cause and arising out of an infraction of rules or regulations will only be sustained when such rules or regulations have previously been approved by JAC: Local 200 vs. Hall Freight Lines, C#38, JAC, Mar. '54; Local 554 vs. Burlington Truck Lines, C#27, JAC, Dec. '55. (The citations here are to Company Rules which incorporate pre-determined disciplinary penalties.)

Observation reports covering unlawful or faulty operation or other improper conduct made by Company or independent agency inspectors are not acceptable as evidence upon which to sustain discipline, unless such observation reports are made by such inspectors after halting the driver and informing him of the nature of the observation report: Local 388 vs. Rock Island Motor Transit Company, C#18, JAC, Mar.'55. The vehicle of the inspector must be clearly marked so that it is identifiable by the truck driver being flagged down.

When an employee is ordered reinstated by JAC with compensation for all time or work lost, monies earned by the employee pending such reinstatement are included in the computation of the compensation awarded: Local 147 vs. Bos Truck Lines, C#40, JAC, Sept. '53; Local 961 vs. Navajo Freight Lines, C#31, JAC, Dec. '53; Local 554 vs. Burlington Truck Lines, C#27, JAC, Dec. '55.

Discharge on grounds of dishonesty sustained for falsification of employment application: Local 299 vs. Kramer Brothers Freight Lines, C#73(a), JAC, June '55; for turning in false information on breakdowns: Local 299 vs. Ellis Trucking Company, C#39, JAC, Dec. '55; Local 554 vs. Consolidated Freightways, C#369, JAC, Sept. '86.

Discharge not sustained when employee failed to pull run on two days alleging "rods out" on tractor, but later inspection disclosed there were no rods out: Local 710 vs. Lake Motor Freight, C#5, JAC, Mar. '52.

Discharges sustained by JAC cover a very wide field including such grounds as tailgating and excessive speed: Local 89 vs. Ziffrin Truck Lines, C#38, JAC, June '55; violation of provisions of lease agreement and Company instructions: Local 721 vs. Arbet Truck Lines, Inc.,

C#42, JAC, Dec. '54; for recklessness: Local 233 vs. Rock Island Motor Transit, C#36, JAC, Sept. '53; Local 135 vs. Roadway Express, C#35, JAC, Dec. '54.

When Employer discharged employee for an accident, and the employee failed to appeal the discharge within ten days, which he was physically able to do, JAC denied the employee's claim that the ten-day appeal period begins to run when the injured employee is determined to be physically fit to return to duty: C#29. Local 710 vs. Eazor Express, Inc., JAC, Dec. '57. ARTICLE 46

The carrying or possession of articles prohibited by law subject employee to discharge: "Mr Chairman, I'd like to place into the record an interpretation of Article 10 of both the City and Road Contracts: *

"If any employee carries or permits on their person or truck any article, the carrying or possession of which is prohibited by state or federal criminal law, such employee shall be subject to discharge." (J. R. Hoffa, JAC, June 1962, Interpretation of Article 10, 1961-1964). *Article 46 in subsequent Supplements.

A driver whose license was suspended in a State other than that of his domicile, and not legally prohibited from driving in the State of his domicile, shall be allowed, in accordance with his seniority, to pull runs in other States where his license is valid. If such a driver operating on a rotating board reaches the top and a load comes up for an area where his license is not valid, he remains on the top but waives his right to pull the load into the area where his license is not valid: Local 200 vs. Consolidated Freightways, C#176, JAC, Sept. '64.

Where Company discharged employee, following warning letter for wearing shorts, the discharge was set aside

and a two-day suspension for violation of Company Rules was substituted. The substance of the Committee decision was that a Company has the right to establish and enforce reasonable work rules regarding minimum working attire, which may exclude the wearing of shorts: Local 299 vs. P.I.E., C#3, JAC, Sept. '69.

Driver would not complete Company form initiated to control DOT Hours of Service; given warning letter (s); subsequently suspended for three days. Appeal of suspension denied: Local 41 vs. Consolidated Freightways, C#142, JAC, June '72.

SUBJECT: Change in D.O.T. Regulation-Disqualification for Conviction of Operating a Motor Vehicle under the Influence of Alcohol-Modification of Bureau of Motor Carriers Safety Rules-Section 391.15 BMCS Docket No. MC 40—Notice 72-22

On November 23, 1972 the Director of the Bureau of Motor Carrier Safety issued a revision of the Safety Regulations pertaining to the disqualification of drivers operating trucks in interstate commerce. In this revised regulation the Director has dropped completely any disqualification imposed upon a truck driver who is convicted of operating his private motor vehicle under the influence of alcohol. This new regulation will become effective December 25, 1972.

In explaining the reason for issuing this revised regulation the Director cited the fact that the previous regulation had been attacked as unconstitutional in various federal courts. One federal judge had held the regulation unconstitutional and several other suits were awaiting trial dates. These suits were commenced by truck drivers represented by the International Brotherhood of Teamsters,

Evidence produced in the St. Paul case showed that automatic disqualification of a truck driver convicted of driving his private auto while intoxicated is out of phase with the current approach toward identification and treating these drivers, and this evidence was accepted by the Director as one of the reasons for making the rule change. This evidence was adduced by Attorney David Loeffler of the law firm of Goldberg, Previant & Uelmen, attorneys ARTICLE 46 for Joint Council 39. The testimony of Paul Scholleart, who was a Research Fellow at the University of Wisconsin in Madison at the time of the trial, clearly established that there is no legitimate basis for assuming that a driver who drove his private car after drinking alcohol would also drive on the job after drinking alcoholic beverages. Mr. Scholleart is now the Director of Labor Data, Inc. of Baltimore, Maryland.

The government also had reports from many places in the nation indicating that local law enforcement personnel, including judges, were reluctant to enter guilty verdicts against a truck driver charged with operating his private auto under the influence of liquor because the effect of a conviction for this off-the-job offense was the loss of his job. *Under the new rules, disqualification can be imposed upon drivers only if convicted of driving on the job under the influence of alcohol or drugs. Disqualification will be for one year for the first offense and for three years if a subsequent* offense is committed within three years of the first offense.

The licensing of drivers is still a matter of State concern and a driver must continue to have a valid State license in order to drive.

This revision is effective on December 25, 1972. However, this revision applies to all drivers who have been

disqualified under S 391.15 prior to this issuance. (Federal Register, Vol. 37, No. 227 Thursday, November 23, 1972)

The following is copied from the transcript of the Proceedings and Minutes of the Central States Area Joint Area Committee in Meeting December 12, 1972:

"... communication between the Motor Carriers Employers Conference and Central States Drivers Council-request for interpretation on Article 46, Local Cartage and Over-the-Road . . . The decision:

"As a result of the recently announced modification of Bureau of Motor Carriers Safety Rules, Section 391. 15 BMCS Docket No. MC 40,

"1. A qualified driver presently suspended from employment or presently employed in a non-driving classification because of prior application of BMCS Rules, Section 391.15 shall be restored to driver status effective 25 December, 1972 providing said driver is qualified to drive under BMCS as amended effective 25, December 1972, and is otherwise qualified under the rules and regulations of all governmental bodies of appropriate jurisdiction."

Presumption of drunkenness on basis of Blood Alcohol Content:

STATES	PERCENTAGES OF 1%
Indiana	.10
Illinois	.10
Iowa	.10
Kansas	0.10 or more
Kentucky	.10
Michigan	.05

Minnesota	.10
Missouri	10/100 of 1% or more
Ohio	.10
Wisconsin	.10 ARTICLE 46

Grievant suspended pending compliance with Motor Carrier Safety Regulations (certification of traffic violations for past year). Returned to duty status following compliance. Claimed pay for time lost. Claim denied: Local 120 vs. Smith's Transfer (Brady Division) C#65, JAC, June '74.

Employee received one-day disciplinary suspension (Monday) following weekend worked as junior seniority employee. Absence not excused per criteria set forth in Article 60, Section 1. Claim that normal seniority rules should apply, and pay claim denied: Local 135 vs. Roadway Express, C#67, Sept. '73.

Grievant discharged for refusal to submit to a sobriety test. Attendant circumstances indicated that request made of driver to take test was not facetious. Contention of grievant that he did not understand request did not constitute acceptable defense. Discharge upheld: Local 413 vs. Eazor Express, C#423, Mar. '75; Local 710 vs. Preston Trucking, C#595, Dec. '83; C#2-84-C11, NGC, Feb. '84.

Driver discharged for making false statements to State Board regarding unavailability of work to insure continued receipt of Unemployment Compensation; payments reflected upon Employer retrospective rating: appeal for reinstatement denied: Local 294 vs. APA Transport, July' 78, C#C-191-78-LC, EC JAC, July '78; C#N-9-78-E6, NGC, Sept. '78.

Employee failed to return to work after receiving full duty release from his personal doctor, Company doctor and State Board approved discontinuance of Worker's Compensation. Following warning letter, discharge for excessive absenteeism was upheld: Local 120 vs. Consolidated Freightways, C#539, Dec. '84.

Appeal of voluntary quit was denied when an employee submitted a signed resignation *after* being offered but rejecting union representation: Local 554 vs. Consolidated Freightways, C#191, Mar. '80.

Jailed employee did not report circumstances of absence within 72 hours following end of requested vacation; terminated as voluntary quit and request for retention on seniority list denied: Local 135 vs. Bodge Lines, C#422, Dec. '80. Decision based on Indiana Uniform Rules & Regulations. (See also Ohio Rider (OR) and Ohio Addendum (LC).

Time begins to toll on required 10-day appeal of discharge (or suspension) when *verifiable* notice of Employer action is received. Appeal of discharge denied: Local 710 vs. Advance Transportation, C#125, Mar. '81.

NOTE. This is in fact an interpretive decision which equates Mailgram / Telegram with the letter required by Article 46.

Employee terminated as result of failure to return to work, following release from Worker's Compensation status, although afforded several opportunities to make himself available. Subsequent requests for reinstatement on seniority list denied: Local 710 vs. Transcon Lines, C#241, Sept. '85.

Employee terminated as a result of failure to return to work following release from Worker's Compensation

status and subsequent altering of Doctor's statement. Appeal of discharge denied: Local 554 vs. PIE, C#102, June '88.

Blood alcohol test taken approximately six (6) hours after driver began tour of duty showed .088% blood alcohol. Discharged for drinking on duty, which employee denied. However, if no alcohol was consumed during the previous six (6) hours, application of Forensic Medical Tables would fix blood alcohol content at a .2 + % at beginning of tour. Discharge upheld: Local 100 vs. Roadway Express, C#138, Dec. '85; NGC #C-N-2-86-C13, Feb. '86.

Where a Company complied in all respects with the National Grievance Committee Agreement Procedures for Handling Discipline Concerning Illegal Drug Use, the discharge was upheld: Local 413 vs. Consolidated Freightways, C#423, June '86; N-8-86-C12, Aug. '86.

Employee's appeal of discharge for theft of time when spending company on duty time in pursuit of personal business was denied: Local 544 vs. Hankin Transportation Personnel, C#31, June '89.

Employee discharged for failure to submit to a drug alcohol test based on probable suspicion appealed the discharge. The appeal was denied based on the fact the Company complied with the provisions of Article 35: Local 325 vs. Carolina Freight, C#184, June '89.

Employee's appeal of his discharge for positive test results administered under the probable suspicion provisions of Article 35 was denied: Local 200 vs. Advance Transportation, C#186, June '89.

APPENDIX F

MASTER RAIL-TRUCK AGREEMENT FOR THE LOCAL UNIONS SIGNATORY TO THIS AGREEMENT, SUPPLEMENTS & RIDERS THERETO COVERING ROAD, CITY, GARAGE, CLERICAL AND INTERMODAL YARD EMPLOYEES FOR THE PERIOD OF APRIL 1, 1998 THROUGH MARCH 31, 2003

ARTICLE 29. VACATIONS

Section 1. A vacation of one (1) week shall be granted with pay to all employees covered by this Agreement who have worked for the employer for a period of one year or more.

Section 2. A vacation of two (2) weeks shall be granted with pay to all employees covered by this Agreement. who have worked for the Employer for a period of two (2) years or more.

Section 3. A vacation of three (3) weeks shall be granted with pay to all employees covered by this Agreement who have worked for the Employer for a period of ten (10) years or more.

Section 4. A vacation of for (4) weeks shall be granted with pay to all employees covered by this Agreement who have worked for the Employer for a period of fifteen (15) years or more.

Section 5. A vacation of five (5) weeks shall be granted with pay to all employee covered by this Agreement who have worked the Employer for a period of twenty (20) years or more.

Section 6. The amount of vacation pay shall be forty-five (45) hours for each week of vacation at the employee's applicable rate of pay.

Section 7. It is understood that during the first year an employee must have been employed for the full years, exclusive of injury and sickness, in order to be entitled to a vacation. During the second and subsequent years the employee must have worked 60% of the total working days of the year, but need not be employed for the full year to be eligible for vacation. No more than one vacation may be earned between anniversary dates of employee. Twelve percent (12%) of regular employees shall be permitted to split their vacation at their own discretion for not less than one week

Section 8. Employees, at their option will be allowed to work (if needed) Saturday and Sunday (or normal off days) prior to and following their vacation.

Section 9. If an employee notifies the Company in writing (on forms provided by the Company) three (3) weeks in advance of going on vacation, the Company will have his vacation check ready prior to taking his vacation.

ARTICLE 30. DRINKING WATER AND REST ROOMS

(a) The Company shall furnish drinking water with proper facilities for cooling at each terminal where employees are stationed.

(b) The employer shall maintain clean sanitary rest rooms with adequate toilet facilities where hourly rated employees are domiciled.

ARTICLE 31 DISCIPLINE

Section 1. The Union agrees to do all in its power to assist the Employer in requiring the employees to give the Employer and honest day's work and abide by the rules and the regulations of the Employer which are not in conflict with this Agreement.

Section 2. The Employer shall not discharge, suspend or take disciplinary actions as respects any employee without just cause, but in respect to discharge, suspension or other disciplinary action shall give at least one (1) warning notice of the complaint against the employee to the employee in writing, by Certified Mail and/or in person, and a copy of same to the Union affected by Certified Mail, except that no warning notice need be given to an employee before he is discharged if the cause for such discharge is dishonesty, drinking of or under the influence of alcoholic beverages, narcotics, or drugs while on duty, or carries or permits the carrying of drugs or narcotics on his person or equipment that is prohibited by Federal or State law, or drinking alcoholic beverages, or use of drugs or narcotics on Company property, or recklessness resulting in serious accident while on duty, or carrying unauthorized passengers, or failure to report an accident, or willful damage or destruction of Company property or equipment or engaging in unprovoked physical violence while on Company property or while on duty or the failure to submit to a sobriety/drug test upon request. The warning notice as herein provided shall not remain in effect for a period of more than six (6) months from the date of said warning notice. All warning notices, discharges, suspensions, or disciplinary action must

be by proper written notice to the employee and the Union affected.

Any employee may request an investigation as to his discharge or suspension. Should the investigation prove and injustice has been done an employee, he shall be reinstated. The Joint rail Truck Arbitration Committee shall have the authority to order full, partial or no compensation for time lost. Appeal from discharge, suspension, or warning notice must be taken within ten (10) regular working days by written notice, and a decision reached within fifteen (15) days from the date of discharge, suspension or warning notice. If the employee involved is not within the home terminal area when the action of discharge, suspension or warning notice is taken, the ten (10) day period will start from the date of his return to the home terminal. If no decision has been rendered on the appeal within fifteen (15) days, the case shall then be taken up as provided in Article 44 of this Agreement.

Section 3. In all cases where an employee is unable to report to work at the regular starting time, for any reason, he shall immediately notify the Supervisor on duty. Failing to so notify the Supervisor on duty, he shall not be reinstated upon his return to work unless reasonable explanation is furnished to the Employer. The first violation of this Article shall result in a warning notice to the employee. On the second such violation of the Article, the employee may be disciplined or discharges. Habitual absenteeism will be grounds for discharge after proper notice to the employee and the Union

ARTICLE 32. COURT AND JURY DUTY

Section 1. Employees away from their regular assigned duties at the request of the Company to attend court or to appear as a witness for the Company or any other purpose on instructions from the Company will be furnished transportation and expenses and will be allowed compensation equal to the amount that would have been earned had such interruption not occurred.

Section 2. When the employee is called on jury duty he shall be paid the daily guarantee each day he serves less that amount he earned as a juror.

ARTICLE 33. TRANSFER OF COMPANY TITLE OR INTEREST

The Employer's obligations under this Agreement including Supplements shall be binding upon its successors. administrators. executors and assigns. The Employer agrees that the obligations of this Agreement shall be included in the agreement of sale. transfer or assignment of the business. In the event an entire operation, or portion thereof, or rights only are sold, leased. transferred or taken over by sale, transfer, lease. transfer, lease. assignment, receivership, or bankruptcy proceedings. such operation or use of rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof. Transactions covered by this provision include stock sales or exchanges. mergers. consolidations. spin-offs or any other method by which a business is transferred.

APPENDIX G

U.S. Department of Labor
Office of Labor-Management Standards
1222 Spruce Street, Suite 9, 109E
St. Louis, Missouri 63103
Telephone Number: (314) 539-2667
FTS: 8-262-2667
Reply to the Attention of:

June 3, 1991

Mr. James Askew
P.O. Box 3436
St. Louis, Missouri 63143

Dear Mr. Askew:

This is to confirm your conversation with Investigator Robert Lewis concerning access to Labor Bulletins from the Missouri-Kansas Motor Carriers Conference, Inc.

Section 104 of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA) requires that documents or decisions which interpret or clarify contractual agreements and/or are used in the grievance process to approve or deny such grievances, be made available to members who wish to view them.

It is my understanding that IBT Local 600, does maintain copies of Labor Bulletins from the Missouri-Kansas Motor Carriers Conference. It is also my understanding that the procedure for a member to view the bulletins requires a member to contact the President of the union and make an appointment to view the bulletins. The member may view, but not copy, the documents in question. However, notes may be taken by the member. The union may have someone in the room while the

member is reviewing the documents. Union officers and employees are not required to interpret the bulletins for the member. Any union officer or employee may interrupt the inspection at any time for reference to the Labor Bulletins.

This letter does not constitute a finding that Local 600 has or has not violated Section 104 with respect to members' access to these bulletins.

Sincerely, /s/ John B. Mitchell

JOHN B. MITCHELL
District Director

U. S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES
ADMINISTRATION
210 North 12th Boulevard - Room 570
St. Louis, Missouri 63101
Phone: 314-425-4691

September 17, 1979

Mr. James Askew
5271 Cedarstone Court
St. Louis, Missouri 63129

Dear Mr. Askew:

This office has been advised by Teamsters Local 600 that the Contract Guide Covering the National Master Freight Agreement and Central States Supplemental Agreements will be available for inspection by members beginning on September 24, 1979. Examination will be allowed at the Local's offices during normal business hours, subject to reasonable request.

Please advise this office when examination has been permitted.

Sincerely,

/s/ Gregory P. Egan

GREGORY P. EGAN
Acting Area Administrator

APPENDIX H

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

St. Louis District Office
1222 Spruce St. Room 8. 100
St. Louis, MO 63103
PH: (314) 539-7800
TDD: (314) 539-7803 FAX: (314) 539-7894

Charge No. 280932156

Mr. James Askew
P.O. Box 3436
St. Louis, MO 63143

Charging Party

Union Pacific Railroad Company
Attn: Mr. Don Berra EEO Manager
1416 Dodge Street Room 321
Omaha, Nebraska 68179

Respondent

DETERMINATION

Under the authority vested in me by the commission, I issue the following determination as to the merits of the subject charge filed under Title I of the Americans With Disabilities Act (ADA).

Evidence obtained during the investigation of the charge revealed that Respondent was enforcing a return to work policy that was in violation of the ADA. At onsite review Respondent admitted that the only way for an employee to return to work after an injury or illness is for the employee's personal physician to release the employee without restrictions.

Respondent's return to work policy violates the ADA. The ADA specifically states that an employer may not use an employment practice or policy that screens out or tends to screen out an individual with a disability or a class of individuals with disabilities. The employer may not limit, segregate, or classify an individual with a disability in any way that negatively affects the individual in terms of job opportunity and advancement. Respondent's policy of only allowing employees who were released by a physician to return to full duty, without restrictions, screens out those employees who have disabilities, and negatively affected their ability to return to work after illness or injury. Based on this analysis, I find that the evidence obtained during the investigation establishes that Respondent violated Title I by not allowing employees who had sustained injury or illness to return to work with a medical release from their personal physician that contained restrictions. Respondent did not attempt to evaluate each situation based on factual evidence to determine if the employee was an "individual with a disability" as defined under the ADA, if the employee could perform the essential functions of their job with or without an accommodation, or make attempts to identify an effective accommodation.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution of this matter. The confidentiality provisions of Sections 706 and 709 of Title VII and commission Regulations apply to information obtained during conciliation.

If Respondent declines to discuss settlement or when, for any other reason, a settlement acceptable to the Office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission representative will contact each party in the near future to begin conciliation.

On Behalf of the Commission:

/s/ Lynn Bruner

Lynn Bruner
District Director

Date: APR 19 1996

cc: Mr. Clifford A. Godiner Peper,
Martin, Jensen, Maichel and Hetlage
Twenty-Fourth Floor
720 Olive Street
St. Louis, MO 63101-2396

APPENDIX I

KASSLY, BONE, DIX, ENGLISH &
WEILMUENSTER P.C.
ATTORNEYS AT LAW
5111 WEST MAIN STREET
BELLEVILLE, Illinois 62226
AREA CODE 618
235-0020 271-1600
FACSIMILE # (618) 235-2382
St Louis Office: (314) 231-1022
WALTER A. KASSLY (1915-1982)
MAURICE E. BONE BARRY
D. DIX
JOHN M. ENGLISH
J. MICHAEL WEILMUENSTER*
DAVID H. BONE JOSEPH R. HILLEBRAND*

ILLINOIS AND MISSOURI

June 19, 1997

State of Illinois Industrial Commission
100 West Randolph St. Suite 8-200
Chicago, IL 60601

RE: James J. Askew v. Rail Terminal Services 97 WC

To Whom It May Concern:

This firm has been retained to represent James A-Askew in regard to the above-captioned matter.

Enclosed is an original and two (2) copies of the Application for Adjustment of Claim and an original and one (1) copy of the Attorney Representation Agreement, in regard to the above captioned matter.

In accordance with the Rules of the Industrial Commission, a copy of each document is being forwarded this date to the Respondent.

Please place this case on the appropriate docket for hearing at your convenience.

Very truly yours,
KASSLY, BONE, DIX, ENGLISH
& WEILMUENSTER, P.C. In
BY /s/ David H. Bone
David H. Bone

DHB:ke Enc. cc: Rail Terminal Services
Mr. James A. Askew

KASSLY, BONE, ENGLISH &
WEILMUENSTER, P.C.
ATTORNEYS AT LAW
5111 WEST MAIN
BELLEVILLE, ILLINOIS 62226-4797
Area Code 618
235-0020 271-1600 Toll Free: 1-800-359-2502
Facsimile #(618) 235-2382
Walter A. Kassly (1915-1982)
Maurice E. Bone*
John M. English
J. Michael Weilmuenster*
David H. Bone
Joseph R. Hillebrand*

*Illinois and Missouri

December 5, 2000

Illinois Industrial Commission 701 South Second Street
Springfield, IL 62704

Re: *James Askew v. Pacific Rail Services No. 97SC34139*
December 12, 2000 - Belleville Docket

To Whom It May Concern:

The above case is listed as #143 on the December 12th Belleville docket. The parties are currently still involved in settlement negotiations and we are, therefore, requesting a continuance from this docket.

Thank you for your attention to this matter.

Sincerely,
KASSLY, BONE, ENGLISH &
WEILMUENSTER, P.C.
By:
Maurice E. Bone MEB/ajb

cc: Mr. Jim Askew

APPENDIX J

U.S. Department of Labor
Occupational Safety and Health Administration
11 Executive Drive, Suite 11
Fairview Heights, IL 62208

618/632-8612

July 16, 1997

James Askew P.O. Box 3436 St. Louis, MO 63143

Dear James Askew:

In response to your nonformal complaint of safety and health hazards at:

Union Pacific Railroad
Route 3
Dupo, IL 62239,

the Occupational Safety and Health Administration (OSHA) has sent a letter to Union Pacific Railroad requesting that the appropriate action be taken to correct the situation. Enclosed is a copy of that letter for your information. As the letter indicates, the employer has been given 5 days to correct the hazards.

Please notify me if no correction has been made within 5 calendar days. We have not revealed your identity to the employer. When we receive additional information from the employer, we will notify you of his response.

Section 11 (c) of the OSH Act provides protection for employees against discrimination because of their involvement in protected safety and health related activity. If you believe you are being treated differently or action is being taken against you because of your safety

or health activity, you may file a complaint with OSHA. You should file this complaint as soon as possible, since OSHA normally can accept only those complaints filed within 30 days of the alleged discriminatory action.

Your continued interest in workplace safety and health is appreciated.

Respectfully,

/s/ Richard W. Taylor

for Peggy A. Zweber
Area Director

Enclosure

APPENDIX K

U.S. Department of Labor
Occupational Safety and Health Administration
11 Executive Drive, Suite II
Fairview Heights. IL 62208
618/6328612 FAX: 618/632-5712

December 1, 1997

Rail Terminal Services.
P.O. Box 40
Dupo, IL 62239

Re: Inspection Number 300605649

Dear Sirs:

The above case has been reviewed and is being amended. The penalty of $800 has been added to Citation 1, Item 1. Due to an administrative error, the penalty was omitted from the Citation which was sent to you on 11/26/97, We are sorry for the inconvenience this may have caused.

Attached is a copy of the amended OSHA-2, Citation and Notification of Penalty. This amended citation must be posted with the original citation until the amended violation(s) has been abated or for 3 working days, whichever is longer.

You have 15 working days from the date of receipt of this amended citation to contest those portions of the original citation which have been amended. The contest period is not extended for the unamended portions of the original citation.

If you have any questions concerning this matter, please contact this office at 618/632-8612.

Sincerely,

/s/ Richard W. Taylor

for Peggy A. Zweber
Area Director

cc: James Askew

Attachment

U.S. Department of Labor Occupational Safety and Health Administration

Inspection Number: 300605649

Inspection Dates: 10/08/97 - 11/17/97

Issuance Date: 12/01/97

Citation and Notification of Penalty

Company Name: Rail Terminal Services

Inspection Site: Route 3 (UNION PACIFIC RAIL YARD), Dupo, IL 62239

Citation I Item I Type of Violation: OTHER

This amended citation must be posted with the original citation until the amended violation(s) has been abated, or for 3 working days, whichever is longer.

The employer has 15 working days from the date of receipt of this amended citation to contest those portions of -the original citation which have been amended. The contest -period is not-extended for the unamended of the original citation.

The following item(s), as described in the attached citation, is (are) amended as follows.

THE PENALTY HAS BEEN ADDED
29 CFR 1904.2 (a)

The log of occupational injuries and illnesses (OSHA Form No. 200 or its equivalent) was not completed in the detail provided in the form and the instructions contained therein

The 1997 OSHA 200 Form did not have the actual number or an estimate of the days of lost work time for at least three cases which were listed as lost time.

Date By Which Violation Must Be Abated: 12/08/97

Proposed Penalty: $800.00

/s/ Richard W. Taylor

for Peggy A. Zweber
Area Director